In The

# Supreme Court of the United States

October Term, 1976

No. 76-61

**WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; CHARLES B. ODOM, M.D.; LOUISIANA STATE BOARD OF MEDICAL EXAMINERS [LBME]; HARRY CONNICK, DISTRICT ATTORNEY ORLEANS PARISH; WILLIAM H. STEWART, M.D.; HEALTH AND HUMAN RESOURCES ADMINISTRATION**; individually in their official capacities, their agents, assigns, successors, those acting in concert with them, and all others similarly situated,

Appellants

versus

CALVIN JACKSON, M.D., and DELTA WOMEN'S CLINIC, INC.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

## MOTION TO AFFIRM OR DISMISS AND BRIEF IN SUPPORT THEREOF

ROBERT PATRICK VANCE
HARRY S. HARDIN, III
Jones, Walker, Waechter,
Poitevent, Carrere and Denegre
225 Baronne Street, 18th Floor
New Orleans, Louisiana 70112
Counsel for Delta Women's
Clinic, Inc.

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### Motion to Affirm or Dismiss

Appellee, Delta Women's Clinic, Inc., pursuant to Rule 16 of the Rules of The Supreme Court of the United States, moves to affirm that portion of the final judgment of the three-judge District Court from which defendants appeal on the grounds that the question presented warrants no further argument and is so unsubstantial as not to warrant further review and to dismiss defendants' appeal for the reasons set forth in the following supporting brief.

## BRIEF IN SUPPORT OF MOTION TO AFFIRM OR DISMISS

### Statute Involved .

La. R.S. 40:1299.33(D), West's LSA Revised Statutes, vol. 23 (1976) Pocket Part at page 149, reads as follows:

No abortion shall be performed on any woman unless prior to the abortion she shall have been advised, orally and in writing, that she is not required to submit to the abortion and that she may refuse any abortion for any reason and without explanation and that she shall not be deprived of any governmental assistance or any other kind of benefits for refusing to submit to an abortion. This provision shall be of full force and effect notwithstanding the fact that the woman in question is a minor, in which event said minor's parents, or if a minor emancipated by marriage, the minor's husband, shall also be fully advised of their right to refuse an abortion for the minor in the same manner as the minor is advised. Compliance with this provision shall be evidenced by the written consent of the woman that she submits to the abortion voluntarily and of her own free will, and by written consent of her parents, if she is an unmarried minor, and by consent of her husband if she is a minor emancipated by marriage, such written consent to set forth the written advice given and the written consent and acknowledgment that a full explanation of the abortion procedure to be performed has been given and is understood.

### Question Presented

Is La. R.S. 40:1299.33(D) Constitutional?

### ARGUMENT

In *Jackson, et al. vs. Guste, et al.*, U.S.D.C. for the Eastern District of Louisiana, No. 74-2425, below, the three-judge District Court held, among other things (See *Appellants Jurisdictional Statement*, Appendix I, p. 34a), that each of the following statutes were



unconstitutional: La. R.S. 14:87, a criminal statute prohibiting the performance of all abortions; La. R.S. 14:87.4, pertaining to the crime of abortion advertising; La. R.S. 40:1299.33(D) the parental or spousal abortion consent statute; and La. R.S. 40:1299.34 the anti-abortion counseling statute. La. R.S. 14:87 was held not unconstitutional when applied in the prosecution of abortions performed by unqualified personnel (See, *Appellants Jurisdictional Statement*, Appendix III, p. 38a).

In this appeal, appellants have chosen only to question the lower court's ruling with respect to La. R.S. 40:1299.33(D), therefore the lower court's holdings with respect to the other statutes are apparently final insofar as this case is concerned.

### THE NARROW HOLDING OF THE THREE-JUDGE DISTRICT COURT'S DECISION WHICH IS THE SUBJECT OF THIS APPEAL IS SO OBVIOUSLY CORRECT AS TO WARRANT NO FURTHER REVIEW.

With respect to La. R.S. 40:1299.33(D), appellants have misstated the question in this case. It is not "Is A Statute Requiring A Woman's Informed Consent To An Abortion Constitutional?" but whether La. R.S. 40:1299.33(D), either in toto or in part, is constitutional. A concomitant issue is whether La. R.S. 40:1299.33(D) is severable so that portions of the statute may be construed as constitutional in accordance with *Planned Parenthood of Central Missouri, et al., v. Danforth et al.*, 96 S. Ct. 2831 (1976). La. R.S. 40:1299.33(D) is not severable because of poor draftsmenship and because, after deleting the unconstitutional portions, the legislative intent is untenably vague and ambiguous.

### A.
### LA. R.S. 40:1299.33(D) IS UNCONSTITUTIONALLY OVERBOARD.

Although the decision of *Planned Parenthood of Central Missouri, et al., v. Danforth, et al.*, 96 S. Ct. 2831 (1976) held that it is not unconstitutional for a state to require written informed consent of a woman prior to submitting to an abortion, it is nevertheless settled that

a state may not protect its interests by means that stifle fundamental liberties when the end sought can be more narrowly achieved. *N.A.A.C.P. v. Alabama,* 377 U.S. 288 (1964); *Shelton v. Tucker,* 364 U.S. 479 (1960). The posture of the State of Louisiana since *Roe v. Wade,* 410 U.S. 113 (1973) and *Doe v. Bolton,* 410 U.S. 179 (1973) has been one of recalcitrant and premeditated resistance to lawful abortion on every front. *See* Note, *Abortion Regulation: Louisiana's Abortive Attempt,* 34 *La. L. Rev.* 676, 685 (1974). The implicit purpose of La. R.S. 40:1299.33(D) is to impose an extra layer of unconstitutionally burdensome regulation on the abortion decision.

Appellants rely on *Planned Parenthood of Central Missouri, et al., v. Danforth, et al.* to maintain the constitutionally of La. R.S. 40:1299.33(D). The statute in that case and the statement of this Court permitting a state to require prior written consent to an abortion are far more narrow than Louisiana's statute even after the unconstitutional language is deleted. (See *Appellants Jurisdictional Statement* p. 5.) *Danforth* held it is not an infringement on a woman's right to abort if she is required to give prior written consent. The Court indicated at 96 S. Ct. 2840 that it is desirable that the decision to abort "be made with full knowledge of its nature and consequences." The Court, in footnote 8 at 2840, gives further insight into the statutorily required "informed consent":

> The appellants' vagueness argument centers on the word "informed." One might well wonder, offhand, just what "informed consent" of a patient is. The three Missouri federal judges who comprised the three-judge District Court, however, were not concerned, and we are content to accept, as the meaning, *the giving of information to the patient as to just what would be done and as to its consequences.* To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession. (Emphasis Added).



The lower court *Danforth* decision shows that the information that is statutorily required to be provided to a woman so that she may give or withhold her "informed consent" relates to the physical and psychological ramifications of choosing a particular course of action, that is, to abort or not. *See,* 392 *F. Supp.* 1362, 1368-69 (E.D. Mo. 1975).

In addition to informed consent, La. R.S. 40:1299.33(D) requires that:

> No abortion shall be performed on any woman unless prior to the abortion she shall have been advised, orally and in writing, that she is not required to submit to the abortion and that she may refuse any abortion for any reason and without explanation *and that she shall not be deprived of any other kind of benefits for refusing to submit to an abortion.* [S]uch written consent to set forth the *written advice and the written consent* . . . . (Emphasis Added).

*Bellotti v. Baird,* 96 S. Ct. 2847, 2866 (1976) clearly held that the state's power to require informed consent is not unlimited:

> [W]e held that a requirement of written consent on the part of a pregnant adult is not unconstitutional *unless it unduly burdens the right to seek an abortion.* (Emphasis Added).

La. R.S. 40:1299.33(D) portends further interference with fundamental rights by expanding "informed consent" so that it unduly burdens the right to seek an abortion. A statute requiring interminable advice, warning and information in addition to informing the woman of the physical and psychological consequences of an abortion burdens the physician and ascribes more meaning to the concept of "informed consent" than appears intended by the *Danforth* case. Thus, the statute, ignoring for the present the severability question, goes too far and is unconstitutionally overbroad. La. R.S. 40:1299.33(D) can be more narrowly drawn so as to protect the state's interests.

## B.
## LA. R.S. 40:1299.33(D)
## IS NOT SEVERABLE.

A concomitant question to be resolved is whether La. R.S. 40:1299.33(D) is so poorly drafted as to preclude severability. Appellants have correctly stated the statute severability test. (See *Appellants Jurisdictional Statement* p. 6.) However, appellants have assumed two things: (1) that the language of the statute which remains after the deletion of the admitted unconstitutional provisions is itself constitutional; (2) and, that the language which remains after the deletion of the admitted unconstitutional provisions is not so interrelated with the deletions that the intent of the legislature is still present. As to the first assumption, the argument of unconstitutional overbroadness has been stated in A above.

The assumption that the remaining language is severable from the clearly unconstitutional provisions is a bald, unsupported assertion. Appellants, as supporters of the legislation, have the burden of demonstrating the severability of the provisions involved.

La. R.S. 40:1299.33(D) falls as a whole because even after deletion of the admitted unconstitutional provisions, it is doubtful and uncertain whether enforcement of the remaining language would be in accordance with the intent of the legislature. Appellants in their *Jurisdictional Statement* at page 5 note that the section of a Missouri statute requiring informed consent was upheld in *Planned Parenthood of Central Missouri, et al., v. Danforth, et al.*, even though the sections requiring parental and spousal consent were held unconstitutional because the Court relied on a severability clause similar to the one that was enacted with La. R.S. 40:1299.33(D). There was little question as to the legislative intent in that case since the Missouri legislature had clearly set out in separate subsections of the statute the circumstances and consent required for an adult woman, a married woman, and an unmarried minor woman. See *Planned Parenthood of Central Missouri, et al., v. Danforth, et al.*, 392 F. Supp. 1362, 1365 (E.D. Mo. 1975). Legislative intent is unclear in La. R.S. 40:1299.33(D).



Even assuming that the language left after deletion of the unconstitutional provisions is constitutional, the intent of the legislature would still be, at best, ambiguous. It is not unreasonable to expect the legislature to require additional safeguards for a minor in addition to the requirement of parental and/or spousal consent to an abortion. Such precautions might explain why the state has required oral and written information to the effect that refusal of an abortion would not deprive the woman of any kind of benefit or governmental assistance. It is not clear that the legislature intended or thought that such paternal and benevolent advice was necessary for an adult woman who would be expected to be a more informed and mature person.

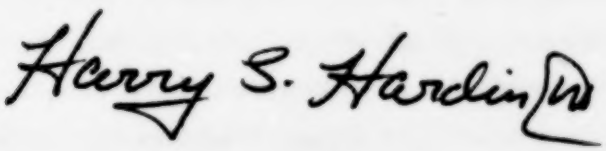
That which must be deleted as unconstitutional and that which would remain are so interrelated and connected that severability is precluded because legislative intent is no longer manifest. The admitted unconstitutional provisions are not simply additional types of informed consent. Deleting the unconstitutional provisions directly affects the operability of the law and destroys the overall intent of the legislature. These are not disjunctive and alternative legislative provisions, but rather conjunctive provisions, and as such cause the statute to fall as a whole.

As a practical matter, a finding that La. R.S. 40:1299.33(D) is unconstitutional does not create a void in the law. There are very few surgical procedures where Louisiana requires by statute a written informed consent. The State of Louisiana has resisted too long the mandates of *Roe v. Wade* and *Doe v. Bolton* and should be compelled to strictly redraw its law.

## CONCLUSION

**For the reasons set forth above, the judgment below should be affirmed.**

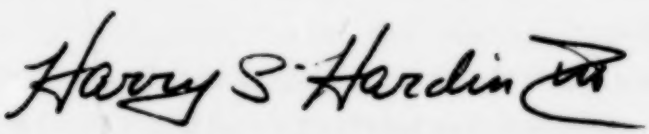
Respectfully submitted,



Robert Patrick Vance
Harry S. Hardin, III
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street, 18th Floor
New Orleans, Louisiana 70112

## CERTIFICATE

I hereby certify that a copy of the foregoing Motion to Affirm or Dismiss has been sent by U.S. mail to opposing counsel properly addressed and postage prepaid on this 27th day of August, 1976.



Harry S. Hardin, III